



OFFICE OF THE ATTORNEY GENERAL
STATE OF ILLINOIS

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August 31, 2020

Via electronic mail

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Via electronic mail

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RE: FOIA Request for Review – 2020 PAC 61760

Dear Mr. McGrath and Ms. Peterson:

This determination is issued pursuant to section 9.5(f) of the Freedom of Information Act (FOIA) (5 ILCS 140/9.5(f) (West 2018)). For the reasons that follow, the Public Access Bureau concludes that the City of Peoria (City) improperly withheld certain limited information in the records responsive to Mr. Patrick B. McGrath's January 9, 2020, FOIA request.

On that date, Mr. McGrath submitted a FOIA request to the City seeking records pertaining to complaints or allegations of misconduct against two City employees, Ashley Elias and Raven Fuller. Mr. McGrath stated that the request included copies of all complaints or allegations, records created or obtained in the investigation of those complaints or allegations, and records pertaining to the outcome of the investigations. On January 16, 2020, the City provided certain records but redacted or withheld certain information pursuant to sections 7(1)(a), 7(1)(c), 7(1)(f), and 7(1)(m) of FOIA (5 ILCS 140/7(1)(a), (1)(c), (1)(f), (1)(m) (West

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2018), as amended by Public Acts 101-434, effective January 1, 2020; 101-452, effective January 1, 2020; 101-455, effective August 23, 2019). On February 19, 2020, this office received Mr. McGrath's completed Request for Review contesting the City's partial denial.

On February 20, 2020, this office forwarded a copy of the Request for Review to the City and asked it to provide unredacted copies of the responsive records for this office's confidential review, together with a detailed explanation of the legal and factual bases for the applicability of the asserted exemptions. On February 27, 2020, this office received the requested materials. On March 2, 2020, this office forwarded a copy of the City's response to Mr. McGrath; he did not submit a reply.

DETERMINATION

"All records in the custody or possession of a public body are presumed to be open to inspection or copying." 5 ILCS 140/1.2 (West 2018); *see also Southern Illinoisan v. Illinois Department of Public Health*, 218 Ill. 2d 390, 415 (2006). A public body that withholds or redacts a record "has the burden of proving by clear and convincing evidence" that the information is exempt from disclosure. 5 ILCS 140/1.2 (West 2018). The exemptions from disclosure are to be narrowly construed. *Lieber v. Board of Trustees of Southern Illinois University*, 176 Ill. 2d 401, 407 (1997).

Section 7(1)(c) of FOIA

Section 7(1)(c) exempts from disclosure "[p]ersonal information contained within public records, the disclosure of which would constitute a clearly unwarranted invasion of personal privacy, unless the disclosure is consented to in writing by the individual subjects of the information." Section 7(1)(c) defines "unwarranted invasion of personal privacy" as:

[T]he disclosure of information that is highly personal or objectionable to a reasonable person and in which the subject's right to privacy outweighs any legitimate public interest in obtaining the information. The disclosure of information that bears on the public duties of public employees and officials shall not be considered an invasion of personal privacy.

A public body's assertion that the release of information would constitute a clearly unwarranted invasion of personal privacy is evaluated on a case-by-case basis. *Chicago Journeymen Plumbers' Local Union 130 v. Department of Public Health*, 327 Ill. App. 3d 192, 196 (1st Dist. 2001). The phrase "clearly unwarranted invasion of personal privacy" evinces a strict standard to claim the exemption, and the burden is on the public body having charge of the record to prove

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that standard has been met. *Schessler v. Department of Conservation*, 256 Ill. App. 3d 198, 202 (4th Dist. 1994).

The Public Access Bureau has consistently determined that records pertaining to complaints or allegations of misconduct against public employees are generally not exempt from disclosure in their entirety under section 7(1)(c) because such information bears on the performance of the employees' public duties. *See, for example*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 31045, issued April 13, 2015; Ill. Att'y Gen. PAC Req. Rev. Ltr. 60991, issued March 12, 2020. With respect to sexual misconduct or harassment complaints, this office has recognized that complainants have legitimate privacy interests in the information they submit, but determined that "[r]edacting the relatively minimal content that could be characterized as salacious and disclosing the remaining information concerning the alleged misconduct would strike the appropriate balance between the public interest and the complainant's privacy interest." Ill. Att'y Gen. PAC Req. Rev. Ltr. 52303, issued October 16, 2018, at 6. Additionally, this office determined that redacting personally-identifying information of any complainants and witnesses "would greatly reduce the impact on their personal privacy." Ill. Att'y Gen. PAC Req. Rev. Ltr. 52303, at 7.

In its response to this office, the City contended that it had redacted certain information concerning Mr. Elias and Ms. Fuller that was personal in nature and did not have a bearing on the public duties of those two employees. Specifically, the City stated that it redacted a portion of an e-mail from Mr. Elias to several individuals in which he discussed his family. Additionally, the City stated that it redacted a portion of a letter from Ms. Fuller that "described accusations made against Fuller's sexual conduct, her friendships and status as an unmarried woman."¹

This office's review of an unredacted copy of the e-mail from Mr. Elias confirmed that the City redacted most of a paragraph in which Mr. Elias discussed highly personal matters related to his immediate family. These details are highly personal in nature and do not relate directly to public duties. This office has determined that Mr. Elias' right to privacy outweighs the public interest in that particular information. *See, for example*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 57449, issued December 31, 2019 (determining that discrete portions of e-mails concerning a then-employee fell within the scope of section 7(1)(c) because the portions revealed details about the employee that were highly personal in nature and did not relate directly to the employee's work performance). However, a portion of the redacted information is general in nature and pertains to Mr. Elias' employment with the City and the misconduct allegation against

¹Letter from Chrissie L. Peterson, Interim Corporation Counsel, City of Peoria, Office of the Corporation Counsel, to Teresá Lim, Assistant Attorney General, Public Access Bureau[,] Office of the Attorney General, State of Illinois (February 26, 2020), at 4.

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him. Because such information bears directly on the public duties of Mr. Elias, its disclosure would not constitute a clearly unwarranted invasion of personal privacy. Accordingly, this office concludes that the City has not demonstrated by clear and convincing evidence that all of the redacted information in the e-mail from Mr. Elias falls within the scope of section 7(1)(c).²

This office's review of the letter from Ms. Fuller similarly confirmed that the City redacted portions in which Ms. Fuller discussed accusations made against her related to sexual conduct and her personal relationships and marital status. This office agrees that Ms. Fuller's discussion of her personal relationships do not pertain directly to her employment or work performance. The discussion reveals specific details about Ms. Fuller's private life that are highly personal in nature, the disclosure of which would be objectionable to a reasonable person. However, the information redacted from the fourth paragraph of the letter pertains to alleged misconduct at the workplace. Such information bears on Ms. Fuller's employment and public duties. Accordingly, this office concludes that the City has not demonstrated by clear and convincing evidence that all of the redacted information in the letter from Ms. Fuller falls within the scope of section 7(1)(c).

Section 7(1)(f) of FOIA

Section 7(1)(f) exempts from inspection and copying "[p]reliminary drafts, notes, recommendations, memoranda and other records in which opinions are expressed, or policies or actions are formulated, except that a specific record or relevant portion of a record shall not be exempt when the record is publicly cited and identified by the head of the public body." Section 7(1)(f) is "intended to protect the communications process and encourage frank and open discussion among agency employees before a final decision is made." *Harwood v. McDonough*, 344 Ill. App. 3d 242, 248 (1st Dist. 2003). "The government is entitled to withhold documents that reflect the agency's give-and-take leading up to its final decisions." *Chicago Tribune Co. v. Cook County Assessor's Office*, 2018 IL App (1st) 170455, ¶29, 109 N.E.3d 872, 880 (2018). The 7(1)(f) exemption also encompasses "communications between government agencies and outside consultants whose analyses and recommendations played essentially the same part in an agency's process of deliberation as documents prepared [internal citation] by agency personnel might have done." *Harwood*, 344 Ill. App. 3d at 248 (quoting *Department of the Interior v. Klamath Water Users Protective Ass'n*, 532 U.S. 1, 10, 121 S.Ct. 1060, 1067 (2001)). However, "purely factual material" is not exempt from disclosure under section 7(1)(f) unless the factual material is "inextricably intertwined" with predecisional deliberative discussions. *Watkins v. McCarthy*, 2012 IL App (1st) 100632, ¶36, 980 N.E.2d 733, 743 (2012) (quoting *Enviro Tech*

²The City also redacted an employee identification number in the provided records. Employee identification numbers constitute "private information" under that term's definition in section 2(c-5) of FOIA (5 ILCS 140/2(c-5) (West 2018)). Accordingly, that information is exempt from disclosure under section 7(1)(b) of FOIA (5 ILCS 140/7(1)(b) (West 2018)).

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International, Inc. v. United States Environmental Protection Agency, 371 F.3d 370, 374-75 (7th Cir. 2004)).

With regard to interview notes, the Public Access Bureau has previously determined that handwritten notes reflecting an evaluator's mental impressions of an individual may fall within the scope of section 7(1)(f). *See, for example*, Ill. Att'y Gen. PAC Req. Rev. Ltr. 48868, issued October 17, 2017, at 4 (handwritten notes reflecting mental impressions of board member about university president's job performance exempt from disclosure); Ill. Att'y Gen. PAC Req. Rev. Ltr. 58984, issued August 1, 2019, at 2 (public body did not improperly deny a request for a copy of interview notes because they were preliminary to a hiring decision and reflected the note-takers' mental impressions of a job applicant). *But see* Ill. Att'y Gen. PAC Req. Rev. Ltr. 50756, issued March 12, 2018, at 5 (handwritten notes that appeared to be factual descriptions or summaries of a meeting not exempt from disclosure under section 7(1)(f) where there was no evidence they were deliberative).

The City argued that it withheld certain preliminary notes and draft documents that fell within the scope of section 7(1)(f). In particular, the City asserted that it withheld: (1) "personal notes taken by Human Resource Director, Mary Ann Stalcup" related to her interviews with Mr. Elias and Ms. Fuller; (2) "handwritten notes of Attorney [Donald] Leist as well as the questions he formulated to interview Elias" and likewise handwritten notes and questions related to his interview of Ms. Fuller; and (3) documents "drafted by Leist as part of his investigation into the matter" of the complaint involving Mr. Elias and Ms. Fuller that were not presented to either individuals or executed.³ The City argued that most of the records constituted "preliminary drafts, notes, recommendations, memoranda, and other records in which opinions were expressed by Attorney Donald Leist[.]" who served as the City's Corporation Counsel; the City argued that those records are further exempt from disclosure under section 7(1)(m).⁴ Additionally, the City contended that it had redacted one e-mail because it was protected by the attorney-client privilege. Specifically, the City stated that the "communication was from Attorney Jill O'Brien (who provides employment law services to the City) to Attorney Donald Leist[.]"⁵

³Letter from Chrissie L. Peterson, Interim Corporation Counsel, City of Peoria, Office of the Corporation Counsel, to Teresa Lim, Assistant Attorney General, Public Access Bureau[,] Office of the Attorney General, State of Illinois (February 26, 2020), at 3-4.

⁴Letter from Chrissie L. Peterson, Interim Corporation Counsel, City of Peoria, Office of the Corporation Counsel, to Teresa Lim, Assistant Attorney General, Public Access Bureau[,] Office of the Attorney General, State of Illinois (February 26, 2020), at 4.

⁵Letter from Chrissie L. Peterson, Interim Corporation Counsel, City of Peoria, Office of the Corporation Counsel, to Teresa Lim, Assistant Attorney General, Public Access Bureau[,] Office of the Attorney General, State of Illinois (February 26, 2020), at 3.


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This office's review of the handwritten notes of Ms. Stalcup and Mr. Leist determined that the notes reflect their mental impressions of Mr. Elias and Ms. Fuller, as they questioned the two individuals regarding the incident that was the subject of a complaint. The notes contain details reflecting the formulation of action and reveal opinions about the two individuals and the relevant incident. While the notes contain factual information about the incident, the information is inextricably intertwined with the mental impressions of Ms. Stalcup and Mr. Leist. This office's review of the documents prepared by Mr. Leist as part of the investigation also confirmed that the City withheld certain draft materials that had not been executed; the materials do not reflect final decisions. Further, there is no indication that the documents were disclosed to Mr. Elias or Ms. Fuller. This office has also reviewed the e-mail from Ms. O'Brien to Mr. Leist and determined that the e-mail reflects Ms. O'Brien acting as a consultant to the City. Disclosure of the e-mail would provide insight into the City's deliberative process, as Ms. O'Brien advised the City on how to proceed with the investigation of the complaint. There is no indication that the handwritten notes, documents, and communication have been publicly cited and identified by the head of the City. Because those records are preliminary and deliberative in nature, the City did not improperly withhold the records pursuant to section 7(1)(f).⁶

In accordance with the conclusions expressed in this determination, this office requests that the City disclose the first, fifth, and sixth sentences of the last paragraph of the e-mail, dated February 23, 2017, from Mr. Elias. This office also requests that the City disclose the entire fourth paragraph of the letter, dated February 23, 2017, from Ms. Fuller.

The Public Access Counselor has determined that resolution of this matter does not require the issuance of a binding opinion. This letter shall serve to close this matter. If you have any questions, please contact me at the Chicago address listed on the first page of this letter.

Very truly yours,



TERESA LIM
Assistant Attorney General
Public Access Bureau

⁶Because this determination concludes that the responsive records are exempt from disclosure pursuant to section 7(1)(f), we decline to address the applicability of sections 7(1)(a) and 7(1)(m) of FOIA to those records.

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